

This is a claim for a back injury. In the June 18, 2008, Award, Judge Howard found (1) claimant injured herself on March 31, 2006, in an accident that arose out of and in the course of her employment with respondent when she tripped on a sidewalk in front of a client's home; (2) just cause existed to extend the time claimant had for providing notice of her accidental injury to respondent from 10 days to 75 days, as provided by K.S.A. 44-520; and (3) claimant sustained a 10 percent whole person functional impairment as

a result of her accident. Consequently, the Judge awarded claimant permanent disability benefits under K.S.A. 44-510e for a 10 percent permanent partial disability.

Respondent contends Judge Howard erred. Respondent first argues claimant did not prove she injured her back as alleged because she had similar low back complaints before the alleged March 31, 2006, incident and because she is not credible. Next, respondent argues the claim is barred under K.S.A. 44-520 because claimant failed to provide timely notice of her accidental injury to respondent. Finally, respondent argues it should not be required to pay any medical expense incurred by claimant as she has failed to prove she injured her back working for respondent. In the alternative, respondent argues its “responsibility lies solely in the medical treatment provided after it was given timely notice of a worker’s compensation claim, not for any medical expenses claimant incurred on her own to cure a personal, preexisting issue.”<sup>1</sup> In addition, at oral argument before the Board, respondent advanced a new argument that was not addressed in its appellate brief – that the Judge lacked the authority to require respondent to reimburse another insurance carrier for the medical expense it paid on claimant’s behalf because that other carrier is not a party in this claim.

Conversely, claimant requests the Board to affirm the Award. Claimant argues she has proven the March 31, 2006, accident injured or aggravated her back and, therefore, she is entitled to receive compensation under the Workers Compensation Act. Next, she argues respondent had sufficient information by April 12, 2006, that would satisfy the notice requirement of K.S.A. 44-520. In the alternative, she argues there was just cause to extend the notice period to 75 days as she was unfamiliar with workers compensation claims and was not aware she had a claim for benefits. Accordingly, claimant argues the notice she provided respondent in May 2006 was timely as it was within 75 days of the accident.

The issues before the Board on this appeal are:

1. Did claimant sustain accidental injury arising out of and in the course of her employment with respondent?
2. If so, did claimant provide timely notice of her accidental injury to respondent?
3. If so, what functional impairment did claimant sustain as a result of the March 31, 2006, accident?

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<sup>1</sup> Respondent’s Brief at 12 (filed Aug. 1, 2008).

4. Should respondent be required to reimburse another insurance carrier, who is not a party to this claim, the medical expense that carrier paid on claimant's behalf for treatment that was incurred for claimant's work-related injury?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant is a registered nurse. Respondent employed claimant to provide nursing services in its clients' homes. Claimant worked for respondent for approximately 2½ years and her job was primarily to plan and implement home care services for clients that had been recently discharged from the hospital. The work required lifting, bending, and a lot of driving.

In March 2006, claimant began experiencing muscle aches and cramping-type pain in her back for which she sought treatment at KU MedWest on March 23 and 29, 2006. Claimant did not attribute her aching back to her work but, instead, told the doctors her symptoms were either related to or worsened by her menstrual cycle. On March 31, 2006, claimant almost fell while walking up a client's uneven sidewalk while carrying her bag, computer, and supplies. Claimant put her right foot down to avoid falling and felt a severe knifelike stabbing pain in her back. After sitting down for about 20 to 30 minutes claimant tended to her patient and left. Claimant immediately called her doctor and was given an appointment for the following week.

At her April 7, 2006, appointment at KU MedWest claimant reported she was in extreme pain as her pain level was 10 out of 10. After having claimant undergo an x-ray, the doctor ordered an MRI. The April 2006 MRI scan showed that claimant had a disk protrusion at L5-S1, which contacted the first sacral nerve roots. Following the MRI, the doctor referred claimant to a neurosurgeon, who recommended physical therapy. By that time claimant was having both back pain and pain shooting down into her legs. The medical bills were submitted to claimant's health insurance company.

Following the March 31, 2006, incident, claimant missed approximately two weeks of work. Claimant told her supervisor, Connie Grisham, about her back pain and that her doctor wanted her to take two weeks off work to rest. Ms. Grisham did not ask claimant about the cause of her back symptoms.

Claimant initially filed this claim in May 2006 alleging she had injured her low back when she slipped on a cracked and uneven sidewalk while going to a client's home. Later, in January 2008, claimant filed an amended Application for Hearing, in which she alleged a series of traumas from March 1 through April 7, 2006, with a specific accident

occurring on March 31, 2006. The amendment also added that claimant injured her back from “lifting, bending, twisting and stooping associated with performance of usual job duties . . . .”<sup>2</sup>

**1. Did claimant injure her back in an accident that arose out of and in the course of her employment with respondent?**

Judge Howard found claimant sustained a specific accidental injury to her back on March 31, 2006, which arose out of and in the course of her employment with respondent. Respondent contends claimant did not injure her back as alleged.

Before the incident on March 31, 2006, claimant experienced backaches and cramping that she linked to her menstrual cycle. Claimant sought medical treatment for those symptoms before March 31, 2006, and was found to have a tilted or retroverted uterus, which can create back symptoms. But after slipping on the sidewalk on March 31, 2006, claimant’s symptoms significantly worsened as she developed sharp, disabling low back pain and radiating pain into her legs. Dr. Vito J. Carabetta, who evaluated claimant at the Judge’s request in April 2007, testified there was no way of knowing whether the back symptoms claimant experienced before the March 31, 2006, incident were caused by her tilted uterus or, instead, caused by her work activities. The doctor attributed all of the 10 percent whole person impairment he found to the March 31, 2006, incident.

The Board finds claimant’s testimony credible that she slipped on an uneven sidewalk while approaching a client’s home. The Board also concludes it is more probably true than not that claimant injured or aggravated her back in that accident on March 31, 2006, and that such accident arose out of and in the course of her employment with respondent.

**2. Did claimant provide respondent with timely notice of her alleged accidental injury?**

Claimant did not initially report her injury as being caused by her work. She explained, as follows:

I believed this was my fault. I thought I was responsible for my injury because I was the one that fell. My perception of workmen’s comp before this was if you get hit with a machine or you cut a finger off or something like that. I honestly thought it was my fault, and I didn’t even know at that point what to do regarding to

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<sup>2</sup> Form K-WC E-1, Amended Application for Hearing (filed Jan. 30, 2008).

workmen's comp. I didn't think this was going to help. I just wanted to get better. I just wanted to go to the doctor and get better, and that's it.<sup>3</sup>

Indeed, claimant did not realize her accident was a workers compensation matter until a physical therapist suggested it. Consequently, claimant then advised respondent her injury was related to work. The parties agree that in May 2006 claimant gave respondent specific notice that she had injured her back at work.

Under K.S.A. 44-520, the period for providing notice to the employer is extended from 10 days to 75 days when the worker establishes "just cause." The Board finds claimant was not aware she had a workers compensation claim or injury until she later spoke with her physical therapist. Accordingly, the Board concludes claimant had just cause for failing to report her injury within the initial 10 days following the accident and, therefore, the notice she provided respondent in May 2006 was timely.

### **3. What is claimant's functional impairment?**

The only medical evidence presented regarding claimant's impairment came from Dr. Carabetta, who found claimant sustained a 10 percent whole person impairment as measured by the *AMA Guides*.<sup>4</sup> The doctor attributed all 10 percent to the March 31, 2006, incident. In his April 24, 2007, medical report, Dr. Carabetta wrote, in part:

Based on the available information, this degree of permanent partial impairment would be fully apportioned to the injury date of March 31, 2006.<sup>5</sup>

And at his deposition, Dr. Carabetta confirmed that he had not changed the opinions expressed in his written report.

Dr. Carabetta's opinions are credible and uncontradicted and, therefore, should not be disregarded. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>6</sup> Accordingly, the Board affirms the Judge's finding that claimant sustained a 10 percent whole person functional

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<sup>3</sup> R.H. Trans. at 14, 15.

<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>5</sup> Carabetta Depo., Cl. Ex. 2 at 4.

<sup>6</sup> See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

impairment due to the injury she sustained on March 31, 2006, while working for respondent.

**4. Should respondent be required to reimburse claimant's health insurance company?**

Respondent contends the Judge erred by ordering it to reimburse claimant's health insurance carrier for the medical expenses claimant incurred for treatment of her low back injury. Respondent first argued this claim was not compensable under the Workers Compensation Act and, therefore, claimant was not entitled to receive any benefits, including medical compensation, in this claim. In the alternative, at oral argument before the Board respondent argued it was responsible for only \$500 as unauthorized medical expense for that medical expense claimant incurred before giving it notice of the accident and that the Judge lacked the authority to order respondent to reimburse another insurance carrier for the medical expense that carrier paid on claimant's behalf when the other carrier was not a party to the claim.

Following the March 31, 2006, accident, claimant received medical treatment and incurred various medical bills before notifying respondent in May 2006 of her accident. As indicated above, claimant was not initially aware she could claim workers compensation benefits for the March 31, 2006, incident. Accordingly, she sought medical treatment from her personal physician and that medical expense was paid by her private health insurance carrier.

The Workers Compensation Act provides that an employer must provide such medical treatment that is reasonably necessary to cure and relieve the injured worker from the effects of the injury.<sup>7</sup> But any medical charge that exceeds the fee schedule created by the Director of Workers Compensation "is unlawful, void and unenforceable as a debt."<sup>8</sup> Consequently, respondent is only required to pay those medical expenses incurred by claimant that conform to the fee schedule.

Next, the Board concludes the Judge has the authority to order respondent to reimburse a private health care insurance carrier when that carrier has paid medical expenses that are directly related to a work-related accident. That reimbursement is limited, of course, to those expenses that conform to the fee schedule.

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<sup>7</sup> K.S.A. 2005 Supp. 44-510h(a).

<sup>8</sup> K.S.A. 2005 Supp. 44-510i(c)(3). Also see K.S.A. 2005 Supp. 44-510i(e).

Finally, the Board finds that medical expense incurred by claimant for her back injury between March 31, 2006, and the date claimant provided respondent notice on May 18, 2006, should be paid by respondent as authorized medical expense.

In short, the Board concludes respondent must pay the medical expense claimant incurred due to her March 31, 2006, accident, which includes reimbursing claimant's private health insurance carrier for any expenses it paid, subject to the fee schedule.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>9</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board affirms the June 18, 2008, Award entered by Judge Howard regarding medical benefits and permanent partial general disability. The Board, however, modifies the Award regarding claimant's attorney fees.

S. Antoinette Sims is granted compensation from Visiting Nurses Association and its insurance carrier for a March 31, 2006, accident and resulting disability. Ms. Sims is entitled to receive 41.50 weeks of permanent partial general disability benefits at \$467 per week, or \$19,380.50, for a 10 percent permanent partial general disability, making a total award of \$19,380.50, which is all due and owing less any amounts previously paid.

Regarding unauthorized medical benefits and future medical benefits, the Board affirms the orders entered by the Judge.

Respondent shall pay the medical expense claimant incurred due to her March 31, 2006, accident, which includes reimbursing claimant's private health insurance carrier for any expenses it paid, subject to the fee schedule.

The record does not contain a written contract of employment between the claimant and her attorney. A reasonable claimant attorney fee shall be awarded in accordance with K.S.A. 44-536 upon presentation of the claimant's attorney's written contract of employment and subject to approval of such contract by the Director. The provision in the Award approving claimant's contract of employment with counsel is set aside.

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<sup>9</sup> K.S.A. 2007 Supp. 44-555c(k).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge